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No. 86-656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, *et al.*,
Petitioners,
v.
JAMES ABOUREZK, *et al.*,
Respondents,

GEORGE P. SHULTZ, *et al.*,
Petitioners,
v.
CITY OF NEW YORK, *et al.*,
Respondents,

GEORGE P. SHULTZ, *et al.*,
Petitioners,
—v.
BRUCE CRONIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE [1]

The American Bar Association ("ABA") is the leading national member organization of the legal profession,

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[1] The parties' letters of consent have been lodged with the Clerk pursuant to Supreme Court Rule 36.2.

counting as members more than 320,000 lawyers throughout the United States. In 1986, the ABA adopted a resolution calling for an end to this country's exclusion of aliens solely on the basis of political beliefs or political associations. ABA, *Summary of Action of the House of Delegates* 16 (Midyear Meeting, February 10-11, 1986).[2] Previously, the ABA had expressed its strong support for implementation of the Helsinki Accords, an international understanding that calls for a freer exchange of people

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[2] The ABA has resolved:

> That the American Bar Association recommends that United States law concerning visa denials should conform to the following standard:
>
> > An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current beliefs or political associations or on the basis of the expected content of the person's statements in the United States.
> >
> > However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or activity in which the government believes they intend to engage, would harm the interests of the United States, including the foreign relations of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country, nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation, nor of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President.
> >
> > Adoption of this principle would require modification of 8 U.S.C. Section 1182(a)(28).

ABA, *Summary of Action of the House of Delegates* 16 (Midyear Meeting, February 10-11, 1986). Implementation of the principles expressed in the ABA's resolution would require modification of 8 U.S.C. § 1182(a)(28) because the McGovern Amendment, 22 U.S.C. § 2691, while consistent with the ABA resolution, only limits exclusions based solely on *membership* in a political organization and does not address exclusions based solely on political *beliefs*.

and ideas throughout the world. *See* ABA, *Summary of Action of the House of Delegates* 18 (Midyear Meeting, February 13-15, 1978); ABA, *Summary of Action of the House of Delegates* 13 (Annual Meeting, August 8-10, 1977). The cases now before the Court directly implicate the concerns reflected in these resolutions.

Moreover, exclusion of three of the aliens in these cases prevented them from exchanging their views with bar association groups, law schools, and lawyers in this country. ABA members have a direct interest in hearing foreign speakers discourse on legal topics in this country. Exclusion of such speakers will impede legal education and debate, which are of considerable importance to the legal profession and to the nation. The ABA's commitment to the free exchange of people and ideas and its opposition to exclusions based on political beliefs and associations, therefore, underlie its strong interest in these cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ABA submits this brief in support of the proposition that the executive branch may not exclude an alien pursuant to 8 U.S.C. § 1182(a)(27) solely on the basis of inferences drawn from the alien's membership in a communist party or affiliated organization. The exclusion of aliens from the United States based solely on their political beliefs or associations violates our nation's commitment to freedom of speech, freedom of association, and the free exchange of ideas both within the United States and across national borders. These fundamental principles, embodied in the first amendment to the United States Constitution and reaffirmed by our government in signing the Helsinki Accords, recognize that the free exchange of information and ideas is vital to the health of a democratic society. By contrast, exclusions based solely on ideological grounds reflect a mistrust of the democratic process, impairing American citizens' ability to

make fully informed decisions by censoring the ideas and information they receive from abroad. Recognizing that such exclusions are inconsistent with the first amendment values expressed in the Helsinki Accords, Congress enacted the McGovern Amendment to restrain the executive branch from excluding aliens on the basis of their political associations.

In the cases now before this Court, the executive branch has excluded aliens invited by Americans to share their views. In at least one of these cases, it has done so on the basis of a presumption that mere membership in certain organizations believed to be supported by ruling communist parties or governments is proof of an alien's representation of a foreign government. If countenanced, this presumption would enable the executive branch to exclude aliens, as it had prior to the McGovern Amendment, solely on the basis of their political associations. Such exclusions would circumvent congressional limits upon the Executive's delegated authority to exclude aliens.

The McGovern Amendment retains its vitality only if the executive branch is required to make an individualized determination regarding each alien, proffering bona fide reasons for exclusion that are genuinely independent of the alien's membership in a disfavored political organization. Accordingly, to preserve the free exchange of ideas that the first amendment, the Helsinki Accords, and the McGovern Amendment seek to ensure, the statutory provisions at issue in these cases must be construed to prohibit a presumption of excludibility from the mere fact of an alien's membership in a communist party or affiliated organization.

ARGUMENT

The Exclusion of Aliens Based Upon Inferences Drawn from Their Membership in Certain Political Organizations Impermissibly Circumvents the McGovern Amendment.

A. Exclusions Based Solely on Ideological Grounds Are Inconsistent with the Free Exchange of Ideas.

The exclusion of aliens based solely on their political beliefs or associations is fundamentally at odds with our democratic society because it deprives American citizens of opportunities to exchange ideas with foreign speakers. The nation's commitment to freedom of speech and freedom of association, both within the United States and across national boundaries, reflects an understanding that the free exchange of ideas is essential to a political system of self-government:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. * * * They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a public duty; and that this should be a fundamental principle of the American government. * * * Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.

Whitney v. *California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). Exclusions based on political associations, however, impede American citizens in their efforts to gather information and insights from abroad about matters of public concern. When government ob-

structs the free exchange of ideas, it prevents American citizens from hearing, discussing, and evaluating all sides of an issue and, as a result, our system of self-government is impaired. *See Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas").

These principles are embodied in the first amendment to the United States Constitution, which is directly implicated when ideological exclusions deprive Americans of the right to receive information and ideas. *See Kleindienst* v. *Mandel*, 408 U.S. 753, 762-65 (1972) (discussed below at p. 16). As this Court has explained in another context:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail * * *. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 390 (1969). Through open and robust debate in this "uninhibited marketplace of ideas," American citizens inform themselves concerning policy choices that shape their lives. The exchange of ideas with people from other countries is a vital component of that marketplace. Indeed, the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.)).

Exclusions based solely on political associations also contravene the spirit of the Final Act of the Conference on Security and Cooperation in Europe, signed at Helsinki in 1975 (the "Helsinki Accords"). In signing the Helsinki Accords, the United States, along with other

participants, pledged to facilitate free movement and contact among persons and organizations of the participating nations. The Helsinki Accords set forth a declaration of the participating states which provides a framework for international relations between East and West.[3] The Accords express a strong commitment to the free flow of people and ideas across national borders:

> The participating states * * * make it their aim to facilitate free movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating states * * * [and] to facilitate the freer and wider dissemination of information of all kinds, to encourage cooperation in the field of information and the exchange of information with other countries.

Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1975. The Helsinki Accords reflect the same understanding of the value of freedom of association and the free exchange of ideas as the first amendment.

In 1977, in order to implement these values and achieve greater compliance by the United States with the Helsinki Accords, Congress enacted the McGovern Amendment, 22 U.S.C. § 2691 (1982). The McGovern Amendment seeks to resolve the discrepancy between the first amendment values reflected in the Helsinki Accords and subsection 28 of section 212 of the Immigration and Nationality Act of 1952 (the "McCarran-Walter Act"), 8 U.S.C. § 1182(a)(28) (1982). The latter provision sanctioned the exclusion of aliens based solely on their political associations. Following the Helsinki Conference, Congress recognized that exclusions of this sort are funda-

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[3] Thirty-five nations participated in the conference, including the vast majority of eastern and western European states, the Soviet Union, Canada, and the United States. *See* Robertson, *The Helsinki Agreement and Human Rights*, 53 Notre Dame Lawyer 34 (1977).

mentally at odds with the American commitment to an open marketplace of ideas. Consequently, the McGovern Amendment seeks a "reduction in the barriers to the free movement of people and ideas" by limiting the instances in which the executive branch will exclude an alien solely on the basis of political association.[4] S. Rep. No. 194, 95th Cong., 1st Sess. 13, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1625, 1635.

In the cases before the Court, the executive branch's interpretation of its delegated authority to exclude aliens is inconsistent with the McGovern Amendment. Respondents in one of the cases, for example, include groups of United States citizens concerned about this country's nuclear arms policy. In 1983, they invited Nino Pasti, a former Italian Air Force general, Italian Senate member, and representative to NATO, to speak with them about the United States' planned deployment of nuclear missiles in Europe. Pasti also is a peace activist and a member of the World Peace Council. The executive

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[4] The McGovern Amendment provides, in relevant part:

> For purposes of achieving greater United States compliance with the [Helsinki Accords] and for purposes of encouraging other signatory countries to comply with those provisions, the Secretary of State should, within thirty days of receiving an application for a nonimmigrant visa by an alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa to such alien, unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States and so certifies to the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate. Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization.

22 U.S.C. § 2691(a).

branch excluded him, claiming that he was an agent of the Soviet Union, but the only fact about Pasti offered as a basis for that conclusion was his membership in the Council, an organization which the State Department considers to be a communist group supported by the Soviet Union. Pet. App. at 92a. The exclusion has deprived respondents of Pasti's insights and an opportunity to inform themselves further about their government's policies. Exclusions of this sort erect barriers to the free exchange of ideas, thereby undermining first amendment values and eviscerating the McGovern Amendment.

B. The McGovern Amendment Promotes Freedom of Association and the Free Exchange of Ideas Across National Borders.

The McGovern Amendment reconciles the McCarran-Walter Act with the principle that aliens should not be excluded solely because of their political associations. The structure and legislative histories of the McCarran-Walter Act and the McGovern Amendment demonstrate that Congress acted in the latter statute to halt the exclusion of aliens on the basis of their political associations.

Of the thirty-three exclusion provisions contained in the McCarran-Walter Act, subsection (a)(28) of section 212 ("subsection 28") is the only one that bars aliens from the United States on the basis of their political associations. When Congress enacted the McCarran-Walter Act in 1952, "membership in, or affiliation with certain subversive organizations * * * [and] advocacy of certain subversive doctrines * * *" was considered one of "[t]he more important grounds for classifying an alien within the excludable classes * * *." H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 45, *reprinted in* 1952 U.S. Code Cong. & Admin. News 1653, 1698. Communists and "any other totalitarian party," 8 U.S.C. § 1182(a)(28)(C)(ii), are the only political groups targeted for exclusion. Thus,

subsection 28 was intended to single out for exclusion aliens adhering to the beliefs, or associating with those who adhered to the beliefs, of "the Communist Party, the Communist Political Association, and other totalitarian parties or any other organization that advocates certain subversive doctrines." H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 49, *reprinted in* 1952 U.S. Code Cong. & Admin. News at 1703. *See also* S. Rep. No. 194, 95th Cong., 1st Sess. 13, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1625, 1635; *accord* S. Rep. No. 842, 95th Cong., 2d Sess. 16 (1978) ("the principal purpose, and effect, of [subsection 28] was to exclude Communists from the United States").

The McGovern Amendment expressly modifies this restriction on admission. Prior to enactment of the McGovern Amendment, exclusion on subsection 28 grounds could be waived, but Congress committed the waiver decision to the executive branch with no explicit guidance as to how that discretion was to be exercised. *See* 8 U.S.C. § 1182(d)(3) (1982). Through the McGovern Amendment, Congress made it clear that exclusions based on political associations should routinely be waived. Specifically, the McGovern Amendment calls upon the Secretary of State to recommend to the Attorney General that a waiver be granted whenever an alien is excludible only by reason of membership in an organization encompassed by subsection 28, unless the Secretary determines and certifies to Congress that admission of that alien would threaten the security interests of the United States. Thus, the McGovern Amendment restricts the scope of subsection 28 by declaring that aliens should not be excluded on the sole basis of their political affiliation unless national security would otherwise be threatened.

The terms and legislative history of the McGovern Amendment demonstrate that it was intended to limit the executive's discretion to exclude aliens on the basis of their political associations. The Amendment itself

states that it was enacted "[f]or purposes of achieving greater United States compliance with the provisions of the [Helsinki Accords]." 22 U.S.C. § 2691(a). *See* H.R. Conf. Rep. No. 537, 95th Cong., 1st Sess. 31-32, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1658, 1662 (the McGovern Amendment "reflects the serious intent of the Congress in moving the United States towards greater compliance with the Helsinki final act * * *"). As Congress viewed it, "[t]his would * * * serve to facilitate * * * a reduction in barriers to the free movement of people and ideas." S. Rep. No. 194, 95th Cong., 1st Sess. 13, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 1635.[5]

The McGovern Amendment thus injects the spirit of the Helsinki Accords into this country's visa policy toward aliens who are members of organizations representing political beliefs ideologically opposed by the United States government. The McGovern Amendment's restriction on exclusions pursuant to subsection 28—the only provision in section 212 that singles out aliens on ideological grounds—indicates Congress' concern that all aliens, communist or otherwise, be admitted or excluded without regard to their political associations. Moreover, the overarching goal of the McGovern Amendment—to implement the Helsinki Accords' promotion of the free exchange of ideas and people across national borders—further evidences Congress' desire to neutralize those exclusion provisions of the McCarran-Walter Act which regulate access to audiences in the United States on the basis of political associations.

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[5] The dissent in the court of appeals erroneously concludes that the majority's analysis "confer[s] upon communists a favored entry status." 785 F.2d at 1072. Rather than conferring a favored status on certain political organizations, the McGovern Amendment removes a disability selectively attached to those groups. Consistent with the Helsinki Accords, the Amendment restrains the executive branch from excluding aliens on the basis of membership in *any* political organization.

C. The Executive Branch's Presumption of Excludibility from an Alien's Political Associations Contravenes Congress' Intent.

As the McGovern Amendment dictates, an alien's membership in a particular political organization is no basis for exclusion absent extraordinary circumstances.[6] In these cases, however, the executive branch may have presumed, solely on the basis of an alien's membership in a communist organization, that he is an agent of a hostile foreign government and therefore excludible under 8 U.S.C. § 1182(a)(27) (1982) ("subsection 27").[7] Although the McGovern Amendment does not preclude the executive branch from excluding aliens "for *reasons other than* membership in or affiliation with a proscribed organization," 22 U.S.C. § 2691(a) (emphasis added), such reasons must be genuinely independent of membership in a subsection 28 organization.[8] The court below correctly concluded that the executive branch may not apply subsection 27 to circumvent the requirements of the McGovern Amendment:

> [W]hen an alien is a member of a proscribed organization, so that subsection (28) applies, the gov-

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[6] In "the unlikely event that the prospective visitor would constitute a threat to U.S. security," S. Rep. No. 194, 95th Cong., 1st Sess. 13, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1625, 1635, the McGovern Amendment directs the Secretary of State to certify to both houses of Congress that the alien poses a threat to national security. *See* 22 U.S.C. § 2691(a). In these cases, no such claim or certification has been made.

[7] Subsection 27 provides for the exclusion of aliens "who the consular officer or Attorney General knows or has reason to believe seek to enter the United States * * * to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." 8 U.S.C. § 1182(a)(27).

[8] Of course, given such independent reasons, the government is not precluded from considering membership in a subsection 28 organization as one of a complex of factors the totality of which warrant exclusion.

> ernment may bypass that provision and proceed under subsection (27) only if the reason for the threat to the 'public interest[,] * * * welfare, safety, or security' is *independent of* the fact of membership in or affiliation with the proscribed organization. Only if such an independent reason exists will the use of subsection (27) leave intact the congressionally mandated restrictions on subsection (28).

Abourezk v. *Reagan*, 785 F.2d 1043, 1058 (D.C. Cir. 1986) (emphasis in the original). *Accord Allende* v. *Shultz*, 605 F. Supp. 1220 (D. Mass. 1985) (subsection 27 does not apply to aliens who are "directly encompassed" by subsection 28).

Nevertheless, the government contends that the executive branch may presume from an alien's membership in a subsection 28 organization that he is affiliated with a hostile foreign government, and then invoke subsection 27 to exclude him. This use of subsection 27 is inconsistent with Congress' intent in enacting the McGovern Amendment. Nino Pasti's membership in the World Peace Council, for example, is the ony fact specifically pertaining to him proffered by the executive branch as grounds for exclusion. *See* Affidavit of Lawrence S. Eagleburger, J.A. at 56; Affidavit of Lawrence S. Eagleburger, Pet. App. at 92a. Because the executive branch believed that the World Peace Council is a communist organization supported by the Soviet Union, it equated Pasti's membership in a subsection 28 organization with his representation of a foreign government.

Similarly, American citizens were denied the opportunity to exchange ideas with Olga Finlay and Leonor Rodriguez Lezcano when the executive branch barred their entry. Respondents invited these two Cuban women to meet with the members and staff of New York City's Commission on the Status of Women and to speak at a number of universities in order to share their expertise on day care and the role of women in Cuba. The execu-

tive branch concluded, however, that Finlay and Lezcano were traveling to the United States not as private citizens but as official representatives of the Cuban government and, therefore, were excludible under subsection 27. The court of appeals recognized in remanding these cases to the district court that the present record is ambiguous as to the facts upon which they were excluded. *See* 758 F.2d at 1060 n.23. To the extent that the executive branch has premised their exclusions on the mere fact of membership in the Federation of Cuban Women, an organization encompassed by subsection 28, it has "brand[ed]" these aliens with the "guilt by [political] association Congress sought to check [through the McGovern Amendment]." *Abourezk*, 785 F.2d at 1058.[9]

The effect of the McGovern Amendment would be entirely vitiated if, as the government contends (Pet. Br. at 26), the executive branch could premise the exclusion of an alien under subsection 27 upon the mere fact of his membership in a subsection 28 organization. The government's position in effect erects an irrebuttable presumption that such an alien necessarily would act as the agent of a hostile foreign government if admitted into the United States. According to the petitioner, this presumed agency affords the executive branch a reason

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[9] The executive branch's exclusion of Tomas Borge is of a different nature. Under Secretary Eagleburger identifies Borge as the Interior Minister of Nicaragua and explains how the admission of this official representative of the Nicaraguan government might harm United States' interests. In contrast to the other three cases of exclusion, Borge's representation of the Nicaraguan government is not inferred from the fact of his membership in a subsection 28 organization. *See* Pet. App. at 86a.

Nevertheless, the court of appeals has directed the district court on remand to resolve whether Borge's mere entry into the United States, as opposed to his prospective activities, furnishes sufficient grounds under subsection 27 to exclude him. The ABA takes no position as to whether an alien's mere entry could justify exclusion under subsection 27.

in addition to membership in a subsection 28 organization as a ground for exclusion. This reasoning overlooks the fact that, *but for* the alien's membership, the presumption that the alien is an agent of foreign government would not arise. The executive branch's reliance on this presumption as its "additional" ground, therefore, disregards the fact that the alien's membership in the subsection 28 organization still furnishes the only factual basis for exclusion.

The executive branch's interpretation of subsection 27 in these cases thus evades subsection 28 and the McGovern Amendment by inferring government representation from mere membership in a political organization. This interpretation erects rather than reduces barriers to the exchange of people and ideas that provoked the Helsinki Accords based on nothing more than the dubious but irrebuttable presumption that an alien's membership in a subsection 28 organization establishes him as an instrumentality of a hostile government. In these cases, the impact of these barriers has been to eviscerate the McGovern Amendment, selectively screening Americans from the insights, criticisms, and opinions of those who live outside the United States. The executive branch's interpretation of subsection 27 must be rejected to preserve the significance of both subsection 27 and the McGovern Amendment,[10] *see Weinberger* v. *Hynson, West-*

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[10] In his dissent below, Judge Bork theorizes that despite the executive branch's use of presumptions, the McGovern Amendment remains intact inasmuch as it still applies to the admission of members of communist groups that the State Department determines are not affiliated with foreign governments. 758 F.2d at 1072. In enacting the McGovern Amendment, however, Congress was aware that it would enable communist leaders affiliated with foreign governments to enter the country. *See* S. Rep. No. 194, 95th Cong., 1st Sess. 13, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1625, 1635 ("One effect of the [McGovern Amendment] would be to open the way to visits by Eurocommunist leaders and to Communist labor leaders without the executive branch having to make

cott & Dunning, Inc., 412 U.S. 609, 633 (1973), and to safeguard first amendment values.

D. The Government's Broad Reading of *Kleindienst* Is Unsupportable.

As an alternate argument, the government contends that *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), decided five years before the adoption of the McGovern Amendment, effectively immunizes the executive branch's exclusion decisions from judicial review. *Kleindienst* clearly recognizes that courts may not assess the wisdom or correctness of the executive branch's foreign policy conclusions arrived at in the exercise of its delegated authority over immigration. 408 U.S. at 770. But *Kleindienst* does not require courts to accept blindly the applicability of the Executive's proffered justifications for exclusion to the case before it. *Id.* at 769. This is especially clear when, as here, the Executive's proffered reason for exclusion conflicts with affirmative, statutory limits on the Executive's discretion to exclude.

In *Kleindienst*, American citizens challenged the Attorney General's subsection 28 exclusion of Ernest Mandel, a Belgian journalist who "advocate[d] the economic, governmental, and international doctrines of world communism." *Id.* at 756. The executive branch stated that it

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the politically difficult individual decisions which might imply a change in overall U.S. policy toward Communism"). The government's argument that a 1979 amendment to the McGovern Amendment indicates that aliens can be excluded simply because their organizations are somehow connected to foreign governments is equally unavailing. (Pet. Br. at 31). The amendment provides, *inter alia*, that the McGovern Amendment "does not apply with respect to representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state." 22 U.S.C. § 2691(b). The fact that this exception is carefully limited to representatives of government-controlled unions demonstrates that Congress did not intend to create a general exception for members of officially recognized or supported organizations.

had refused to waive Mandel's exclusion not on ideological grounds but because, on a prior trip, Mandel had exceeded the conditions of his visa by accepting more speaking engagements than his visa application reported and by appearing where contributions were solicited for political causes. *Id.* at 758-59. Thus, *Kleindienst* not only turned on different facts but also did not consider the impact of the McGovern Amendment.

Plaintiffs argued that the first amendment prohibited the Attorney General from denying a waiver to Mandel, urging the Court to review the Executive's exercise of discretion and to balance the government's interest in exclusion against plaintiffs' countervailing first amendment interests. The Court rejected these arguments and concluded that as long as the basis for exclusion is facially legitimate and bona fide, "the courts will neither look behind the [Executive's] exercise of * * * discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770.

Although the Court in *Kleindienst* held only that it would not review the Executive's exercise of discretion, the government interprets the case much more broadly to immunize its exclusion decisions from any effective judicial review. In so doing, petitioner ignores the critical fact that *Kleindienst* involved no express congressional limitation on the Executive's discretion to exclude aliens.[11] *See* 8 U.S.C. § 1182(d)(3) (aliens excludible

[11] The government invokes *Kleindienst* for the proposition that the executive branch possesses broad authority over the conduct of foreign affairs, and that the court of appeals' analysis improperly intrudes on this authority. Pet. Br. at 33-34. *Kleindienst* neither expands nor contracts the executive's power over the conduct of foreign affairs. The executive branch has no power to exclude aliens in a manner contrary to Congress' direction. Therefore, the court of appeals' requirement that the executive conform to Congress' delegation does not impose impermissibly on the conduct of foreign policy.

under subsection 28 could be admitted "in the discretion of the Attorney General * * *").

Kleindienst makes clear that the power to admit or exclude aliens belongs to Congress in the first instance and is delegated to the Executive. *Id.* at 76. In *Kleindienst*, the Executive acted within the authority delegated by Congress. Here, the executive branch exceeded its delegated authority by violating the McGovern Amendment's limits on executive discretion. The court of appeals, therefore, properly reversed the judgment of the district court and required the executive branch to show that its grounds for exclusion did not violate the McGovern Amendment. The court correctly reconciled subsection 27 with the McGovern Amendment by requiring the Executive to make an individualized determination, proffering bona fide reasons that are genuinely independent of membership in a political organization, demonstrating that the alien "seek[s] to enter * * * to engage in activities which would be prejudicial to" an interest protectible under subsection 27. 8 U.S.C. § 1182 (a) (27).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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